United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1140

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket Nos. 76-1140, 76-1306

B P/S

UNITED STATES OF AMERICA,

Appellee

v.

DAVID N. BUBAR, ET AL

Appellants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

Appellee

v.

MICHAEL TICHE, Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW YORK

Reply Brief of Defendant Appellant DENNIS TICHE

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ISSUED PRESENTED

1. Whether the bizarre misconduct of counsel for co-defendant Bubar was different in kind and degree from the types of misconduct previously considered by this court?

2. Whether Rule 608(b)(2) of the Federal Rules of Evidence requires that a witness be hostile or adverse to the party cross-examining her regarding specific instances of misconduct by another witness?

STATEMENT OF THE CASE

Appellant Dennis Tiche relies on the Statement of Facts and Proceedings to Date in his original brief.

ARGUMENT

I. The bizarre misconduct of counsel for co-defendant Bubar was different, both in kind and degree, from the types of disruptive behavior previously considered by this Court.

Defendant Dennis Tiche has assigned error to the trial court's refusal to grant motions for severance based on the misconduct of counsel for co-defendant Bubar. The facts concerning this misconduct are amply set out in the

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supplemental appendix compiled by co-defendant Bubar and adopted by the other appellants.

The government's argument on this point is twofold: (1) that relief from prejudicial joinder under Rule 14 of the Federal Rules of Criminal Procedure is left to the discretion of the trial court and (2) that the Second Circuit has in the past held the misconduct of co-defendants insufficient to warrant severance.

Appellant agrees that severance under Rule 14 is left to the discretion of the trial court and that the standard on appeal is abuse of discretion. But this certainly does not end the inquiry. It is nevertheless true that the trial judge in a joint trial "has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." Schaffer v. United States, 362 U.S. 511 (1960); United States v. Johnson, 478 F.2d 1129 (5th Cir.,1973). Where the trial court abuses its discretion, this Circuit has not hesitated in reversing the conviction. United States v. Branker, 395 F.2d 881 (2nd Cir. 1968); United States v. Kelley, 349 F.2d 720 (2nd Cir. 1965).

The prejudice in this case went far beyond the isolated, inept cross-examination which was the essence of the complaint in United States v. Calabro, 467 F.2d 973 at 987 (2nd Cir.1972), cert. denied, 410 U.S. 926 (1973). Attorney Zalowitz was not only inept, but obstructive and antagonistic as well.

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Even more damaging was his defense itself, which required the jury to accept co-defendant Bubar as a prophet or seer, and which inevitably induced extreme skepticism toward the defendants as a whole. The prejudice created by counsel for co-defendant Bubar steadily mounted in a trial which lasted over three months.

The behavior complained of in this case is also different in kind from that considered in United States v. Aviles, 274 F.2d 179 (2nd Cir.1960) and the other cases relied on by the government. All of those cases deal with outbursts by co-defendants, and all are based on the assumption that such misconduct "would provide an easy device for defendants to provoke mistrials whenever they might choose to do so." Aviles, supra. 274 F2 at 193. In other words, there is a suggestion of collusion or deliberate disruption in all of these areas. See e.g., United States v. Bentvena, 319 F.2d 916 (2nd Cir. 1963), cert. denied, 416 U.S. 940 (1974).

The situation is completely different where the misconduct is that of an attorney for a co-defendant in an extended and complex trial. There is no potential here for deliberate abuse or disruption. There is not the slightest suggestion that Dennis Tiche or any of the other defendants colluded in or directed the performance of counsel for co-defendant Bubar. Mr. Bubar's choice of representation was a completely independent decision beyond the control or direction of his co-defendants.

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Dennis Tiche and the other defendants were not guilty of any misconduct. They earnestly sought to maintain the calm and deliberative atmosphere which due process requires. The conduct of Attorney Zalowitz made such an atmosphere impossible and denied Dennis Tiche the due process of law to which he was entitled.

Rule 608(b(2) does not require that a witness be adverse to the party examining her.

Appellants have assigned error to the court's exclusion of testimony by Loretta Marley bearing on John Shaw's credibility. Appellant Dennis Tiche first sought to introduce this testimony, but it was objected to and excluded (T.9559). The government then examined Miss Marley regarding his - Shaw's - veracity (T.9562). At the conclusion of the government's cross-examination, co-defendant Connors sought to cross-examine Miss Marley regarding the basis for her opinion. The testimony was again excluded. (T.9572.)

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The government argues that this testimony was properly excluded because cross-examination requires adversity between the party calling the witness and the examining party, citing National Mutual Casualty Company of Tulsa v. Eisenhower, 116 F.2d 891 (10th Cir., 1940), and Berwin-White Coal Mining Co. v. Firment, 170 F. 151 (2nd Cir., 1908). Neither case stands for this proposition. In fact, neither case deals with the admissibility of testimony regarding credibility at all. Nor does either address the relationship between co-defendants in a criminal trial. Both Eisenhower and Firment are tort cases, and both simply affirm the power of a trial judge to examine witnesses whenever justice requires. Firment, supra, 170 F. at 153-154; Eisenhower, supra, 116 F.2 at 895.

The federal courts have been increasingly reluctant to define the nature and scope of examination in terms of hostility or adversity. The Federal Rules of Evidence, for example, explicitly discard the voucher rule and allow what amounts to cross-examination of one's "own" witness. Rule 607, Fed. Rules of Evidence. This Circuit had rejected the voucher rule even before promulgation of Rule 607, saying that: "We do not limit our repudiation of the pernicious rule against impeachment of one's witness to instances in which the witness is an 'adverse party' or 'hostile,'. the search for truth is not to be confined by any such limitation ..." U.S. v. Freeman, 302 F2d 347, 351, (2nd Cir.,1962),

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cert. denied, 375 U.S. 958 (1963).

Notions of adversity or hostility are equally nebulous in the context of Rule 608(b)(2). Appellant contends that at least in the context of criminal conspiracy trials cross-examination is simply examination by a party other than the one calling the witness.

Any other rule would call for a subjective evaluation of which, if any, of the co-defendants were sufficiently hostile to permit cross-examination with regard to each witness called by a co-defendant.

The government also relies on U.S. v. DeSapio, 456, F.2d 644 (2nd Cir. 1972), cert. denied, 406 U.S. 933, for the proposition that evidence of a witness' subornation of perjury is inadmissible to impeach his credibility. DeSapio is distinguishable from the present case in that evidence of the witness' perjury had been admitted at the first trial. The Court held that the new evidence was merely cumulative. DeSapio supra, 456 F2d at 648.

As to the other issues, the appellant Dennis Tiche relies on his original brief.

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CONCLUSION

Dennis Tiche's convictions should be reversed with instructions to enter a judgment of acquittal on Count Four and for a new trial on Counts One, Two, and Three.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing reply brief was mailed, postage prepaid, to all counsel of record on November 29, 1976.

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